IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.761 OF 1997.

Sau Shaila Jaywant Jadhav
res. at 113, Surendra Nagar,
Nagpur 15. ..Appellant
(Original Defendant No.2)

versus

Sau Sulochana Vasant Bhavsar,
res. at Pradhan Park,
Nashik ..Respondent.
(Original Plaintiff)

Mr.P.B.Shah for the Appellant

Mr. Vasant Bhavsar for the Respondent

Coram : S.R.Sathe, J.
Dated : 14th Feb., 2006

JUDGMENT.

1. Appellant, the original defendant No.2 in Special Civil Suit No.115 of 1984 has preferred this second appeal against the judgment and order passed by the court of Additional District Judge, Nashik in Civil Appeal No.248 of 1992 whereby decree for specific performance passed in favour of the plaintiff was confirmed and the appeal was dismissed with cost. For the sake of convenience hereafter the parties shall be referred to as the plaintiff and defendants.

2. Brief facts giving rise to this appeal are as under :

. On April 30, 1981 the defendant no.2, father of defendant no.1 agreed to sale two suit plots bearing, Nos.16 and 17 each measuring 3010 sq.ft to the plaintiff at the rate of Rs.30 per sq.ft and accepted amount of Rs.6000/-. The defendant no.1 accordingly executed the plot booking receipt for and on behalf of defendant no.2 in favour of plaintiff. By virtue of the said receipt it was agreed that the plaintiff will pay second instalment of Rs.2000/- within 45 days from the execution of the receipt. As per the said receipt payment of full purchase price was to be made within 30 days from the receipt of N.A. permission and approved lay out or within three months from 30.4.1981 and sale deed was to be executed at that time. The plaintiff’s husband who happens to be a practising advocate at Nashik offered to pay balance amount of Rs.2000/- within 45 days from the date of booking of the plots. However,, the defendant no.1 told plaintiffs husband that as the sale deed of the plot no.28/1 was not executed in favour of defendant

no.2, he would not accept the amount of Rs.2000/-. According to plaintiff, thereafter her husband contacted defendant no.1 for verifying the title deed and other documents regarding the plots. However, he was not shown any document. Ultimately, on 21.4.1983 the plaintiff issued notice to defendants and called upon them to give necessary information regarding the suit plots. Inspite of receipt of notice, the defendants did not give any reply. The plaintiff, therefore issued another notice dated 6.4.1984. The defendants gave false reply and refused to execute the sale deed. On the contrary, they informed that as the plaintiff did not pay the balance amount within 45 days as agreed, they have cancelled the agreement. The plaintiff came to know that the defendant no.2 purchased the land bearing plot no.28/1A on 12.3.1982 and inspite of the same she did not execute the sale deed. Hence, the plaintiff filed suit for specific performance of agreement to sale dated 30.4.1981.

3. The defendants filed their written statement at exhibit 21 and opposed the suit claim. They admitted the execution of the plot booking receipt dated 30.4.1981 and other details. They however,

contended that the plaintiff or her husband had never offered Rs.2000/- balance amount to them during the period of 45 days from the execution of the receipt and as such they did not issue any reply to the notice issued by the plaintiff. However, when they received the second notice they replied the same and informed that the agreement has been cancelled by them. Thus, according to defendant the plaintiff failed to perform her part of contract and as such she was not entitled to file the suit for specific performance. The defendants therefore prayed for dismissal of the suit.

4. On these pleadings, the learned trial judge framed issues at Exhibit 26. After considering the evidence adduced by both the parties, the learned judge came to the conclusion that the document in question which is styled as plot booking receipt is in fact the agreement to sale the suit plots. He also held that the plaintiff had offered Rs.2000/- within 45 days from the execution of the receipt, but the defendants did not accept the same. He also held that the plaintiff was and is ready and willing to perform her part of the contract, but the defendant no.2 has committed breach of agreement.

He, therefore, passed decree for specific performance in favour of the plaintiff.

5. Being aggrieved by the said judgment and order the original defendant no.2 filed Civil Appeal No.248 of 1992. After hearing arguments of both the learned Advocates, the first appellate court dismissed the appeal and confirmed the decree passed by the trial court.

6. It is the above mentioned order passed by the first appellate court is challenged in this second appeal.

7. While admitting the appeal this court (Coram: S. Radhakrishnan, J.) has passed the following order.

> "Grounds (A), (B) and (C) raise substantial question of law. Admit."

The said grounds are as under :

> (A) Whether a deposit receipt acknowledging only payment of earnest mopney can be termed as an agreement for sale? Whether the deposit receipt dated 30/04/1981

in the present case can assume the legal character of an agreement for sale?

(B) Whether the deposit receipt dated 30/4/1981 is a concluded contract between the parties and whether respondent plaintiff could claim specific performan on the basis of such a deposit receipt?

(C) Whether term No.5 in the deposit receipt dated 30.4.1981 requiring payment of Rs.2000/- within 45 days therefrom was an essence of the contract or not?

8. In this appeal before me Shri P.B.Shah, learned Advocate for the original defendant No.2 has urged only two points. Firstly, he submitted that the plaintiff had made a false statement that she had paid the entire consideration and that amount of second instalment was also paid. However, there is no evidence to show that the second instalment was paid by plaintiff so it must be held that plaintiff was not ready and willing to perform her part of the contract. He, therefore, submitted that decree for specific performance cannot be granted in favour of the plaintiff. As against this, Shri Bhavsar learned Advocate for the plaintiff supported the judgment and order passed by both the courts below.

9. It is not in dispute that the defendant no.1, who is father of defendant no.2 executed plot booking receipt in question in favour of the

plaintiff, the wife of Advocate Bhavsar. The receipt of Rs.6000/- under the said agreement is also admitted by the defendants. It appears that at one point of time the defendants tried to take stand that the document in question i.e. receipt dated 30.4.1981 is infact not a agreement and as such plaintiff is not entitled to claim any relief under the said document. However, after taking into consideration all the facts and circumstances, as well as the recitals in the said document, the learned trial judge came to the conclusion that though the said document is styled or titled as plot booking receipt, it is in fact an agreement to sale the property. Not only that, but it seems that the plaintiff was asked to impound the document and accordingly after depositing necessary penalty amount the document in question has been impounded. So, we have to treat this document as agreement to sale.

10. It is true that as per the document dated 30.4.1981, plaintiff was to pay second instalment of Rs.2000/- within 45 days from the execution of the said document. It is the case of plaintiff's husband that he had infact offered Rs.2000/- to

defendant no.1 i.e. father of defendant no.2 who was managing the transaction and had in fact executed the receipt in question. However, at that time the defendant no.1 told him that the sale deed in respect of the land bearing plot No.28 of village Chunchale is not executed in favour of defendant no.2 and as such he would not accept the said amount. It is true that there is no documentary evidence on record to show that the plaintiff or her husband had offered such amount and defendant no.1 had refused the same. The evidence with regard to this point is only word against word. Naturally, question arose as to whether the plaintiff's version was correct or not. It appears that after taking into consideration all the facts and circumstances of the case and the preponderance of probabilities, the learned trial judge has held that the plaintiff has proved that she had offered Rs.2000/- through her husband to defendants, but defendants did not accept the same. There is no reason to interfere with this concurrent finding of fact recorded by the courts below.

11. It must be noted that admittedly, before the expiry of 45 days from the execution of the document

in question the sale deed of the land bearing No.28 was not executed in favour of defendant no.2. Moreover, the plaintiff was also asking for showing document of title. So, under the circumstances, the defendants must have refused the amount of Rs.2000/-. So, merely on that ground it cannot be said that plaintiff was not ready and willing to perform her part of contract. It must also be noted that if really the defendant no.2 had revoked the contract after completion of first 45 days, as contended by her, then she would have given reply to plaintiff's first notice and informed her that the contract is already revoked as the payment is not made within 45 days, but that has also not happened. So, all this goes to show that the contention taken by the defendants in this behalf is not correct.

12 It does appear that in the first notice issued by the plaintiff to defendant no.1 it has been mentioned that the two cheques have been given, one of Rs.6000/- and the other of Rs.4000/-. However, it appears that there is obviously some mistake. Even plaintiff in his plaint has nowhere averred that the amount of Rs.10,000/- has been paid

to the defendants. So, merely because in one notice there is some reference with regard to the other cheque of Rs.4000/-, we can't jump to the conclusion that the plaintiff had deliberately made any false statement with an oblique motive. That would certainly not be sufficient to jump to the conclusion that the plaintiff was not ready and willing to perform her part of the contract. So, there is no substance in the argument advanced by the learned Advocate for the defendant in that behalf.

13. The learned advocate for the original defendants argued before me that the material on record goes to show that the plaintiff was not ready and willing to perform her part of the contract. However, it must be noted that whether the plaintiff is ready and willing to perform her part or contract or not is not a question of law, leave aside substantial question of law. It has been so held by the Apex Court So, in view of the above ruling it must be held that the learned Advocate for the plaintiff is not entitled to argue this point in this appeal. So, there is in fact no substantial

question of law involved in the present appeal and the same shall have to be dismissed.

12. Even from the perusal of the evidence on record also it is very clear that the finding recorded by both the courts below on this point of readiness and willingness is legal and correct and there is no necessity to interfere with the same. Hence, the following order :

ORDER

Appeal is dismissed with costs.

(S.R.Sathe, J.)

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